IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 779 OF 2006
IN
COMPANY APPLICATION NO. 863 OF 2006
IN
COMPANY APPLICATION NO.720 OF 2006
IN
COMPANY PETITION NO. 201 OF 1994

Tukaram Sridhar Bhat .. Appellant.

V/s.

1. M/s. K.R.Steelunion,
A Company Limited & Others. .. Respondents.

Mr.H.J.Thakkar with Mr. Umesh Mahajan and Mr.M.K.Nesari for the Appellant.

Mr.J.A.Shah i/by M/s. J.A.Shah Associaties for the Respondent No.3.

Mr. S.Ramakantha, Dy. Official Liquidator is present.

CORAM : R.M.LODHA & S.A.BOBDE,JJ.

DATED : 07TH NOVEMBER, 2006.

P.C.:

. We heard Mr. H.J.Thakkar, senior counsel for the Appellant, Mr. J.A.Shah, counsel for the Respondent No.3 and Dy.Official Liquidator for the Respondents No.1 and 2.

2. Admit.

3. The Dy.official liquidator waives service for the Respondents No.1 & 2 and M/s.J.A.Shah Associates

waive service for the Respondent No.3.

4. The Appeal is heard finally at this stage.

5. The brief facts essential for disposal of the Appeal are as follows.

6. Flat No.12A on the second floor and the Garage No.1 on the ground floor of New Sagar Darshan building, situate at 81-82, Bhulabhai Desai Road, Mumbai, was owned by one Boman P. Irani. The said Flat with the Garage was let out by the said owner to M/s. Poysha Industrial Company Limited. M/s. Poysha Industrial Company Limited has, admittedly, then sublet the said flat with the garage to one Tukaram Sridhar Bhatt. It appears that Boman P. Irani filed the eviction suit being RAE Suit No.901/2695 of 1990 for eviction against the tenant M/s. Poysha Industrial Company Ltd., as well as the sub-tenant Shri Tukaram Sridhar Bhatt. During the pendency of the said suit Shri Boman P.Irani died and his heirs and legal representatives brought themselves on record in the aforesaid suit. M/s. Poysha Industrial Company Ltd., was ordered to be wound up by the order dated 9th of January, 1998. It is not in dispute that Suit No.901/2695 of 1990, filed by late B.P.Irani in the Small Causes Court, was withdrawn on

12th July, 2004. In the meanwhile, after the M/s.Poysha Industrial Company was ordered to be wound up, in the year 1999 the Company Application No. 731 of 1999 was made, seeking return of the premises to the owner. The said Company Application was dismissed by the learned Company Judge on 14th February, 2000. The Appeal came to be filed against the said order, which was dismissed on 22nd of August, 2000.

7. On 20th of December, 2000, an Application was made by the owner of the property under section 446 of the Companies Act, 1956 for leave to file eviction suit in the Small Causes Court, Mumbai against the official liquidator and the subtenant.

8. After hearing the parties, leave was granted by the learned Company Judge on 15th of February, 2001. Consequently, the owner (landlord) filed the suit being RAE Suit No.228/366 of 2001 before the Small Causes Court, wherein the official liquidator of M/s.Poysha Industrial Company Ltd. and the subtenant Tukaram Sridhar Bhatt are party defendants. In that suit, the landlord had prayed for decree against the tenant who failed to hand over peaceful and vacant possession of the subject premises.

9. The present Respondent No.3 made Company Application No. 45 of 2006 before the learned Company Judge under section 446 of the Companies Act for leave to file eviction suit against the official liquidator of company in liquidation and the subtenant (present Appellant). The said company application came to be disposed of by the learned Company Judge on 23rd February, 2006 by the following order :-

> "2. Mr.Thakkar, the learned Senior Counsel appearing on behalf of Respondent No.3 states that in the event of the Petitioner making an application for amendment of the plaint in R.A.E.Suit No. 228/366 of 2001 on the basis of the averments made in the present Judges Summons, Respondent No.3 will not oppose the same. In view thereof, it is not necessary to grant the present Judges Summons.
>
> 3. Liberty to the Applicants to apply, if necessary. The amendment, if granted will however be subject to the rights and contentions of Respondent No.3 on merits."

10. The present Respondent No.3 then made another Company Application being Company Application No.720 of 2006, seeking leave of the court under section 446 of the Companies Act, for filing eviction suit against the official liquidator of the company in liquidation. Curiously, in that company application the present Appellant (sub-tenant) was not impleaded as party Respondent. The learned Company Judge disposed of the

said company application No.720 of 2006 by the order dated 27th July, 2006. The said order reads thus :

> "1] Heard Mr.Shah appearing for the applicant and the Acting Official Liquidator for the respondent.
>
> 2] Perused the affidavit in support. Since the applicant has instituted a suit against the Company in Liquidation, seeking its eviction from the premises more particularly, described in the affidavit in support and the suit/ application is pending Company Application is made absolute in terms of prayer clause (a).
>
> 3] This order is passed without prejudice to the rights and contentions of the Official Liquidator and it would be open for the Liquidator to raise all such contentions as are permissible in law."

11. The present Appellant who is in occupation of the subject premises as sub-tenant, then made Application being Company Application No. 863 of 2006, for setting aside the order dated 27th July, 2006. The said Company Application was, interalia, filed on the ground that the prejudicial order of grant of leave came to be passed on 27th July, 2006 at his back and in disregard to Rule 117 of the Companies (Court) Rules, 1959. The learned Company Judge dismissed the said Application by order dated 28th September, 2006, giving rise to the present Appeal.

12. To complete the narration of facts,it needs to be

mentioned here that pursuant to the leave granted by the learned Company Judge on 27th July, 2006, the landlord has filed eviction suit in respect of the subject premises against the official liquidator of the company in liquidation as well as the sub-tenant.

13. Rule 117 of the Companies (Court) Rules, 1959 reads thus :

> "R. 117. Application for leave to commence or continue suit or proceedings.-- An application under section 446 (1) for leave of the Court to commence or continue any suit or proceeding against the company shall be made upon notice to the Official Liquidator and the parties to the suit or proceeding sought to be commenced or continued. "

14. Rule 117 thus mandates that the Application under section 446 (1) for leave of the court to commence or continue any suit or proceedings against the company shall be made upon notice to the official liquidator and the parties to the suit or proceeding <u>sought to be commenced or continued.</u> (emphasis supplied). All parties to the suit "sought to be commenced" are necessarily required to be given a notice of the Application for leave under section 446(1) by virtue of Rule 117 of the Companies (Court) Rules, 1959.

15. It is an admitted fact that the present

Appellant (sub-tenant) has been impleaded as party defendant to the suit for eviction filed by the landlord. However, admittedly, he was not given any notice and he was not even impleaded as party in the Company Application under section 446(1). The order dated 27th July, 2006 having been passed at the back of the Appellant being not in conformity with Rule 117 of the Company Court Rules, in our opinion, is liable to be set aside.

16. Our view finds support from the Judgment of the Patna High Court in the case of **Sahu Jain Ltd. vs. Rohtas Industries Ltd., 115 (2003) Company Cases 997,** wherein the division bench of the Patna High Court with reference to Rule 117 of the Companies (Court) Rules, 1959 held that in connection with the application under section 446 of the Companies Act, Rule 117 has been framed which provides that for obtaining leave under section 446 of the Act, notice must be given, inter alia, to the official liquidator and also to the parties to the suit. In the matter before the Patna High Court, one of the defendants to the suit was not given notice as required under Rule 117. The Division Bench held that the Appellant had a statutory right to get notice and had admittedly not got any notice when leave was granted by the company judge; it had sufficient locus to

complain against such grant of leave and was legitimately entitled to file a petition before the Company Judge to revoke the leave.

17. The appellant made an application for setting aside the order dated 27th July, 2006. We find that the said Application has also not been considered properly by the learned single Judge. The impugned order dated 28th September, 2006 came to be passed without adverting to Rule 117 of the Companies (Court) Rules.

18. In our considered view, both the orders dated 27th July, 2006 and 28th September, 2006 are liable to be set aside and we order accordingly.

19. Company Application No. 720 of 2006 is restored to file.

20. The learned Company Judge shall hear and decide the Company Application afresh in accordance with law, after hearing the present Appellant (sub-tenant) as well.

21. All contentions of the parties are kept open to be agitated before the learned company Judge in Company Application No. 720 of 2006.

22. The Appeal is allowed accordingly with no order as to costs.

(R.M.LODHA,J.)

(S.A.BOBDE,J.)

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